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No. 88-1875

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STEVEN CATALANOTTE,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

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June 16, 1989

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review defendant's due process claim when defendant failed to raise the claim in state court, and the state courts did not rule on the issue.

2. Whether the Sixth Amendment right to a public trial or the Fourteenth Amendment right to due process requires that full retroactivity be accorded to a 1979 state court holding that specified procedures for courtroom closure during the testimony of an undercover police officer.

3. Whether due process requires that a conviction that is final and valid under settled principles of retroactivity be invalidated, under a subsequent nonretroactive holding on procedures for courtroom closure, for the limited purpose of recidivist sentencing.

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THE PEOPLE OF THE STATE OF NEW YORK,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the State of New York, asks this Court to deny the petition for a writ of certiorari, which seeks review of the judgment of the New York Court of Appeals that affirmed defendant's sentence as a second felony offender, upon his conviction of attempted robbery in the second degree, on his guilty plea. That judgment affirmed an order of the Appellate Division of the Supreme Court, Second Judicial Department.

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 72 N.Y.2d 641, 536 N.Y.S.2d 16 (1988). The opinion of the Appellate Division is reported at 137 A.D.2d 697, 524 N.Y.S.2d 788 (2d Dep't 1988). The opinion of the trial court denying defendant's motion to vacate a 1971 conviction that was the

predicate for his being adjudicated a second felony offender is not reported but is reproduced in the Appendix to this response.

JURISDICTION

The judgment of the New York Court of Appeals was entered on December 15, 1988. On February 16, 1989, defendant's motion for reargument was denied. 73 N.Y.2d 918, 539 N.Y.S.2d 302 (1989). The petition was docketed in this Court on April 17, 1989, which is within the statutory time.[1] This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a) (1966 and Supp. 1989).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .

U.S. Const. Amend. XIV § 1

. . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

N.Y. Crim. Proc. Law § 400.21(7)(b)

A previous conviction in this or any other jurisdiction which was obtained in violation of the rights of the defendant under the applicable provisions of the constitution of the United States must not be counted in determining whether the defendant had been subjected to a predicate felony conviction. The defendant may, at any time during the course of the hearing hereunder controvert an allegation with respect to such convic-

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1 This Court initially returned defendant's petition, by letter dated April 19, 1989, because the petition failed to conform to the Court's rules on style and format. Defendant thereafter filed a corrected copy which respondent received on May 17, 1989.

tion in the statement on the grounds that the conviction was unconstitutionally obtained. Failure to challenge the previous conviction in the manner provided herein constitutes a waiver on the part of the defendant of any allegation of unconstitutionality unless good cause be shown for such failure to make timely challenge.

STATEMENT OF THE CASE

Defendant Steven Catalanotte was convicted of attempted robbery, on a plea of guilty, for a gunpoint robbery that he and an accomplice committed on a Brooklyn street. On November 4, 1981, he and his accomplice took a bag of jewelry from Charles Krypel at gunpoint; they planned to sell the jewelry and share the proceeds. On fleeing the robbery, defendant and the accomplice got into a gun battle with police and fired several shots at a police officer.[2]

Defendant was indicted for several counts of Robbery in the First Degree and Robbery in the Second Degree, and several counts of Assault, and other offenses.[3] On April 2, 1986, defendant pled guilty to Attempted Robbery in the Second Degree.[4] At sentence, the prosecution sought to have defendant adjudicated a second felony offender, based on a 1971 conviction for narcotics offenses which defendant had appealed and which

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2 The accomplice was arrested the next day, but defendant fled the jurisdiction and was not arraigned until June 19, 1985.

3 The crimes for which defendant and his accomplice were indicted were three counts of Robbery in the First Degree (P.L. § 160.15[2], [3], and [4]); Robbery in the Second Degree (P.L. § 160.10[1]); Attempted Aggravated Assault Upon a Peace Officer (P.L. §§ 110.00/120.11); Attempted Assault in the Second Degree (P.L. §§ 110.00/120.05[3]); Criminal Possession of a Weapon in the Second Degree (P.L. § 265.03); two counts of Criminal Use of a Firearm in the First Degree (P.L. § 265.09); Grand Larceny in the Second Degree (P.L. § 155.35 [1965] [amended 1986]); Criminal Possession of Stolen Property in the First Degree (P.L. § 165.50 [1965] [amended 1986]).

4 The accomplice, Dennis Schwartz, pled guilty to Attempted Robbery in the First Degree and on February 4, 1983, was sentenced to a term of imprisonment of four to eight years.

had been affirmed. *People v. Catalanotte*, 41 A.D.2d 968, 344 N.Y.S.2d 72 (2d Dep't 1973), *aff'd*, 36 N.Y.2d 192, 366 N.Y.S.2d 403 (1975). Defendant asserted that he could not be adjudicated a second felony offender because the 1971 conviction had been obtained in violation of his Sixth Amendment right to a public trial, as construed by *People v. Jones*, 47 N.Y.2d 409, 418 N.Y.S.2d 359, *cert. denied*, 444 U.S. 946 (1979). In *Jones*, decided four years after defendant had exhausted his appeal on his 1971 conviction, the New York Court of Appeals held that before a trial court could close the courtroom during the testimony of a witness, the Sixth Amendment guarantee of a public trial required that the court make an inquiry of the witness to establish the reasons for closure and make factual findings based on that inquiry. *Jones*, 47 N.Y. 2d at 414-15, 418 N.Y.S.2d at 362-64. The trial court, rejecting that claim, adjudicated defendant a second felony offender, pursuant to N.Y. Crim. Proc. Law § 400.21(7)(b) (McKinney 1983). The court imposed a sentence of two to four years, a sentence which could not have been imposed on a first offender.

Defendant then moved unsuccessfully in the trial court to vacate the 1971 conviction, under N.Y. Crim. Proc. Law § 440.10(2)(a) (McKinney 1983), on the ground that *Jones* applied retroactively to his 1971 conviction and rendered that conviction unconstitutional. The trial court held that *Jones* was not retroactive and denied the motion. Defendant never sought appellate review of that decision.

Defendant then appealed the 1986 judgment to the Appellate Division, Second Department, asserting that the second felony offender sentence was unlawful because *Jones* rendered the 1971 conviction "unconstitutional" within the meaning of N.Y. Crim. Proc. Law § 400.21(7)(b), even if *Jones* did not apply retroactively on a motion to vacate the 1971 judgment. The Appellate Division held that *Jones* was not retroactive to collateral attacks on the validity of convictions and affirmed the judgment of conviction. *People v. Catalanotte*, 137 A.D.2d 697, 524 N.Y.S.2d 788 (2d Dep't 1988).

Defendant then appealed to the New York Court of Appeals, arguing that under N.Y. Crim. Proc. Law § 400.21(7)(b) the constitutionality of a predicate conviction is to be determined by the law in effect when that conviction is used to enhance a sentence for a later crime. Defendant conceded that *Jones* was not retroactive. *People v. Catalanotte*, 72 N.Y.2d 641, 644, 536 N.Y.S.2d 16, 17 (1988). He argued, however, that because the statute did not explicitly provide that the retroactivity of a constitutional decision be considered, retroactivity principles did not apply under the statute. The Court of Appeals rejected defendant's claim and affirmed the order of the Appellate Division, holding that,

> [F]or purposes of determining whether a prior conviction was unconstitutionally obtained (C.P.L. 400.21(7)(b))—and thus may not be counted for predicate felony purposes—the proper inquiry is to determine whether the conviction was obtained in violation of the defendant's rights as defined by the law at the time of conviction or by present law which is properly applied to it under recognized principles of retroactivity.

72 N.Y.2d at 643, 536 N.Y.S.2d at 17.

This petition followed.

REASONS WHY THE WRIT SHOULD BE DENIED

Nothing in defendant's petition, nor in the decision of the New York Court of Appeals, presents an issue of law worthy of this Court's review. Defendant claims that he was denied due process when he was sentenced for robbery as a recidivist in 1986 based on his 1971 narcotics conviction. According to defendant, a change in the law, announced after his 1971 conviction became final, rendered that conviction "unconstitutional" within the meaning of New York's second felony offender statute. Resolution of this claim, however, involves a straightforward application of settled principles of retroactivity, and the interpretation of a state statutory procedure for determining when a convicted defendant is subject to the

increased penalty prescribed for recidivists. *See* N.Y. Crim. Proc. Law § 400.21(7)(b). Neither of these issues merits this Court's review.

The state court's interpretation of its recidivist sentencing statute presents only a question of state law not reviewable by this Court. The determination that *Jones* was not retroactive also does not merit review. Defendant conceded below that *Jones* was not retroactive. Furthermore, the New York Court of Appeals' decision does not conflict with any decision of other state courts of last resort or of a federal court of appeals. *See* Sup. Ct. R. 17.1.

Nor does the New York Court of Appeals' opinion conflict with this Court's holding in *Burgett v. Texas*, 389 U.S. 109 (1967). In *Burgett*, this Court held that a conviction obtained in violation of *Gideon v. Wainwright*, 372 U.S. 335 (1963), could not be used to enhance a sentence. As *Burgett* noted, *Gideon* applies retroactively even to convictions that were final when that case was decided. *Burgett*, 389 U.S. at 114; *Tehan v. United States*, 382 U.S. 406, 416 (1966); *Linkletter v. Walker*, 381 U.S. 618, 628 n. 13 (1965). In this case, defendant's conviction was allegedly obtained in violation of *People v. Jones*, a case which defendant has conceded is not retroactive. Therefore, *Burgett* is not at odds with the decision of the New York Court of Appeals, and provides no basis for granting the writ.

Accordingly, defendant's petition fails to raise an issue worthy of this Court's review and should be denied.

I. THIS COURT LACKS JURISDICTION TO REVIEW DEFENDANT'S DUE PROCESS CLAIM BECAUSE DEFENDANT DID NOT RAISE THE CLAIM IN STATE COURT, AND THE STATE COURTS DID NOT RULE ON THE ISSUE.

Defendant never argued in state court that he would be denied due process if his sentence were enhanced by a conviction obtained in violation of *People v. Jones*, 47 N.Y.2d 409, 418 N.Y.S.2d 359, *cert. denied*, 444 U.S. 946 (1979), and the state courts did not decide the issue. Therefore, this Court has

no power to consider defendant's claim, and his petition must be denied. *See Heath v. Alabama*, 474 U.S. 82, 106 S. Ct. 433, 436 (1985); *Cardinale v. Louisiana*, 394 U.S. 437, 438-39 (1969).

In state court, defendant couched his argument as a narrow question of statutory interpretation. Defendant asserted that because N.Y. Crim. Proc. Law § 400.21(7)(b), providing that an "unconstitutionally obtained" conviction not be used to enhance a sentence, did not mention principles of retroactivity, the New York Legislature intended that these principles should have no role in determining the constitutionality of a predicate conviction. Based on that claim, defendant argued that *Jones* applied to invalidate the use of his 1971 conviction to enhance his 1986 sentence, irrespective of whether *Jones* applied retroactively to invalidate the 1971 conviction itself (Defendant's Brief to the Appellate Division at 6-7; Defendant's Brief to the Court of Appeals at 6-14, reproduced in the Appendix to this response at pages 14a-15a and 6a-12a, respectively). Defendant never mentioned due process or asserted that his right to due process was being denied.[5]

Because defendant never litigated a due process claim, the state courts never considered the broader due process issue that defendant seeks to raise in this petition. The decision of the New York Court of Appeals merely interpreted the statutory phrase "unconstitutionally obtained" contained in N.Y. Crim. Proc. Law § 400.21(7)(b) to determine whether the drafters of the statute intended that principles of retroactivity apply under that statute. The due process claim defendant now asserts was not addressed by the state courts. Indeed, the dissenting opinion, to which defendant often cites in his petition, discusses defendant's claim exclusively in terms of the construction of

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5 Defendant at one point claimed that it was "unfair" to enhance his sentence with the 1971 conviction because he had served his sentence on that conviction (Defendant's Brief to the Court of Appeals at 10, reproduced in Appendix at 8a-9a). That assertion, at best, calls in question the fairness of sentencing someone as a recidivist, a claim which defendant does not raise here and one which has already been rejected by this Court, *Oyler v. Boles*, 368 U.S. 448, 451 (1962).

N.Y. Crim. Proc. Law § 400.21(7)(b) and what the New York Legislature intended in drafting the statute. *People v. Catalanotte*, 72 N.Y.2d 641, 647-49, 536 N.Y.S.2d 16, 19-21 (1988).[6]

Therefore, defendant's petition must be denied because it raises an issue not litigated or decided in the state courts. *See* 28 U.S.C. § 1257(a); *Cardinale v. Louisiana*, 394 U.S. 437, 438-39 (1969).

II. THE NEW YORK COURT OF APPEALS PROPERLY CONCLUDED THAT *PEOPLE V. JONES* IS NOT RETROACTIVE.

Settled principles of retroactivity support the determination of the New York Court of Appeals that *People v. Jones*, 47 N.Y.2d 409, 418 N.Y.S.2d 359, *cert. denied*, 444 U.S. 946 (1979), is not retroactive to cases that were final when the *Jones* decision was rendered. The *Jones* decision neither applied settled law to new facts, nor was it designed to correct an aspect of criminal procedure that substantially impaired the truth-finding process. Moreover, defendant conceded in the New York Court of Appeals that *Jones* was not retroactive, and his petition does not present that issue to this Court.[7] Therefore, the *Jones* decision does not apply retroactively to defendant's 1971 conviction.

A new decision will be applied retroactively to convictions that were final when the new decision was announced, if the

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6 Defendant even asks this Court to construe the state statute. He asserts that retroactivity cases are not precedent for the instant case because "none of them deal with a statute that on its face provides that the constitutionality of prior convictions—final judgments for all other purposes [sic] can be challenged today" (Defendant's Petition at 20). The New York Court of Appeals, however, determined that the state legislature intended that principles of retroactivity apply under the statute; that decision raises a question of state law only and is not reviewable by this Court.

7 Defendant expressly conceded this point in a letter to the New York Court of Appeals, reproduced in the Appendix to this response at 3a-4a. Furthermore, when the trial court denied his motion to vacate the 1971 conviction, ruling that *Jones* was not retroactive, defendant never sought an appeal from that decision.

decision merely applies settled precedent to new fact patterns, or if it rules that the trial court lacked jurisdiction to convict or punish the defendant.[8] *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 714 (1987); *United States v. Johnson*, 457 U.S. 537, 549, 550 (1982) (plurality opinion). *People v. Jones* does not fall into any of these categories.

In *Jones*, the New York Court of Appeals for the first time set out the procedure for determining whether a courtroom should be closed during the testimony of an undercover police officer.[9] The *Jones* decision preserved the rule that trial courts had discretion to close the courtroom if public testimony by an undercover police officer would endanger the safety of the witness or jeopardize the integrity of other criminal investigations. The new rule that emerged from the *Jones* decision was the requirement that the trial court make an inquiry of the witness and then make factual findings based on that inquiry. *People v. Catalanotte*, 72 N.Y.2d 641, 643-44, 645-46, 536 N.Y.S.2d 16, 17-18 (1988); *People v. Cuevas*, 50 N.Y.2d 1022, 1024, 431 N.Y.S.2d 686, 687 (1980).[10] Thus, the *Jones* decision articulated

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8 A judgment is final when "the availability of appeal [is] exhausted, and the time for petitioning for certiorari had elapsed. . . ." *Allen v. Hardy*, 478 U.S. 255, 106 S. Ct. 2878, 2880 n.1 (1986).

9 The *Jones* court noted that it had not had "occasion to consider the methodology by which a court was to go about the business of determining whether the facts underlying the application [for closing the courtroom] fell within the standards enunciated by the cases." *Jones*, 47 N.Y.2d at 414, 418 N.Y.S.2d at 362-63.

10 This Court has similarly held that a defendant's right to a public trial may be overcome by an "overriding interest" to preserve higher values, provided that those interests are articulated and that the trial court make findings adequate to support closure. *Waller v. Georgia*, 467 U.S. 39, 48 (1984) (right to public trial in criminal cases applies to suppression hearings); *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 509-10 (1984) (right to public trial in criminal cases applies to *voir dire*). Two federal district court cases have applied *Waller* retroactively. *Santos v. Brown*, 596 F. Supp. 214, 218-19 (D.R.I. 1984); *Jones v. Henderson*, 683 F. Supp. 917, 921 (E.D.N.Y. 1988). Neither has yet been appealed. Thus, the retroactivity of *Waller*, which is similar but not identical to *Jones*, has not been decided by a federal court of appeals, and the issue is not ripe for review by this Court.

a doctrine about which the law had previously been silent. For the first time, in a long line of cases in which courtrooms were closed during the testimony of undercover police officers, the court specified the procedure to be followed. Accordingly, *Jones* is neither a decision that applied settled precedent to new fact patterns, nor did it hold that a trial court lacked jurisdiction to convict or punish a defendant.[11]

The retroactivity of a decision like *Jones*, which does not fall within these narrow categories, is determined by weighing the following factors:

> (a) the purpose to be served by the new standards,
>
> (b) the extent of reliance by law enforcement authorities on the old standards, and
>
> (c) the effect on the administration of justice of a retroactive application of the new standards.

Solem v. Stumes, 465 U.S. 638, 643 (1984) [quoting *Stovall v. Denno*, 388 U.S. 293, 297 (1967)]. Analysis of these factors shows that the *Jones* decision is not retroactive.

1. The *Jones* rule does not "go to the heart" of a reliable determination of guilt or innocence.

The purpose of the new rule is the most significant of the three factors. *Brown v. Louisiana*, 447 U.S. 323, 328 (1980). Consequently, complete retroactivity is accorded to a rule if its major purpose "is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in

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11 Also, a new rule will not be applied retroactively if the rule is a " 'clear break' " with past decisions. *United States v. Johnson*, 457 U.S. at 549 [quoting *Desist v. United States*, 394 U.S. 244, 248 (1969)]; *see also Griffith v. Kentucky*, 107 S. Ct. at 716 (clear break exception held not to apply to cases pending on direct appeal, but holding left open question whether exception applied to cases that were final). *Jones* was not a "clear break" with the past only because no prior New York decision had considered the procedure to be followed by a court in considering an application to close the courtroom.

past trials." *Brown v. Louisiana*, 447 U.S. at 328 [quoting *Williams v. United States*, 401 U.S. 646, 653 (1971) (plurality opinion)]. Only a new rule which "goes to the heart of the truth-finding function" requires retroactive application; "that a rule may have some impact on the accuracy of a trial does not compel a finding of retroactivity." *Allen*, 106 S. Ct. at 2880 [quoting *Solem v. Stumes*, 465 U.S. at 643-45].

The rule of *Jones* was designed to protect society's interest in public trials by insuring that trials would not be closed for less than compelling reasons. *Jones*, 47 N.Y.2d at 414-15, 418 N.Y.S.2d at 363. The *Jones* court reasoned that public trials protected the fairness of trials generally by hindering concealment of abuses of the judicial process. 47 N.Y.2d at 416, 418 N.Y.S.2d at 364. It further noted that public trials created the possibility that someone watching the trial might discover that he or she had information about the trial and that the presence of the public might deter a witness from committing perjury. 47 N.Y.2d at 417, 418 N.Y.S.2d at 364.

The *Jones* decision, although theoretically related to truth-finding, does not "go to the heart" of a reliable determination of guilt or innocence. Indeed, the fact that, upon a proper showing, the *Jones* rule permits the suspension of the right to a public trial without defendant's consent demonstrates that that right is not fundamental to truth-finding. In contrast to the right protected in *Jones*, rights fundamentally affecting the truth-finding process cannot be suspended or denied, even for compelling reasons, because their abridgement renders the trial unreliable. Among these rights are the right to counsel, *Stovall v. Denno*, 388 U.S. 293, 297 (1967) [citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)], and the right to a pretrial determination of the voluntariness of a confession, *Jackson v. Denno*, 378 U.S. 368 (1964).

The *Jones* decision is utterly unlike these cases. The constitutional issues addressed in *Stovall* and *Jackson* directly affect the reliability of the means by which guilt or innocence is determined. Those addressed in *Jones*, however, do not directly affect the issue of guilt or innocence. An important aspect of

Jones is society's interest in open trials, 47 N.Y.2d at 416, 418 N.Y.S.2d at 364, which does not concern the fairness of the trial of any particular defendant. Furthermore, closing a courtroom, even if improvident, does not involve the admission of untrustworthy evidence, the exclusion of trustworthy evidence, or the denial of the right to counsel. A violation of *Jones*, therefore, does not create the "probabilit[y]" that a trier of fact in any particular case reached an unjust result. *See Johnson v. New Jersey*, 384 U.S. 718, 729 (1966) (assessing a new constitutional rule's impact on truth-finding involves "a question of probabilities"). Consequently, the aspect of trial procedure implicated by the *Jones* decision does not cast doubt on the reliability of the jury's determination of the guilt or innocence of an accused.[12]

That *Jones* determined that improvident closure of the courtroom was *per se* reversible error does not demonstrate that *Jones* involved issues fundamental to truth-finding. The *Jones* court determined that harmless error analysis should not apply because of society's interest in public trials and because of the difficulty of showing prejudice. The prejudice a defendant might suffer from improper closure of the courtroom is the possibility, speculative though it may be, that defendant will be deprived of information from a hitherto unknown witness, or that the deterrence to perjury that the public's presence may provide will be reduced. The *Jones* court concluded that requiring a defendant to undertake the difficult task of showing this kind of prejudice could render the right to public trial beyond appellate review. 47 N.Y.2d at 416-17, 418 N.Y.S.2d at 364.

Therefore, the *Jones* rule does not go to the "heart" of a reliable determination of an accused's guilt or innocence. The rule's principal purpose was to vindicate society's and defendants' interest in open trials, not to protect defendants from untrustworthy evidence. Accordingly, a violation of *Jones* does not cast doubt on the soundness of a jury's verdict.

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12 Indeed, defendant himself does not assert that the alleged violation of *Jones* raises a question about the factual accuracy of his 1971 conviction.

2. The adverse impact on the administration of justice and the state's reliance on pre-*Jones* law, compel nonretroactive application of the *Jones* decision.

The adverse impact on the administration of justice and the state's reliance on the law before *Jones* militate against complete retroactive application of the decision. *See Tehan v. United States*, 382 U.S. 406, 419 (1966). Before *Jones*, no rule required that a trial court make factual findings before closing the courtroom.[13] Retroactive application of *Jones* would require retrial of all pre-*Jones* cases in which the trial court closed the courtroom during the testimony of a witness without making factual findings. Because such cases would be at least eight years old, there is the real possibility that retrial would be precluded because the evidence may have become stale.

These kinds of cases may be numerous, as is indicated by the many cases decided since *Jones*, involving the closing of a courtroom during the testimony of an undercover police officer. *See, e.g., People v. Cuevas*, 50 N.Y.2d 1022, 1024, 431 N.Y.S.2d 686, 687 (1980); *People v. Pollock*, 50 N.Y.2d 547, 551, 429 N.Y.S.2d 628, 630-31 (1980); *People v. Policano*, 139 A.D.2d 773, 773, 527 N.Y.S.2d 519, 519-20 (2d Dep't 1988); *People v. Romain*, 137 A.D.2d 848, 848, 525 N.Y.S.2d 313, 313 (2d Dep't 1988); *People v. Gutierrez*, 133 A.D.2d 647, 647-48, 519 N.Y.S.2d 756, 756 (2d Dep't 1987); *People v. Boucher*, 112 A.D.2d 310, 310, 491 N.Y.S.2d 756, 757 (2d Dep't 1985); *People v. Stanton*, 108 A.D.2d 688, 689, 485 N.Y.S.2d 998, 999 (1st Dep't 1985); *People v. Gonzalez*, 74 A.D.2d 928, 928, 426 N.Y.S.2d 318, 319 (2d Dep't 1980); *People v. Cousart*, 74 A.D.2d 877, 878, 426 N.Y.S.2d 295, 297 (2d Dep't 1980); *People v. Cantone*, 73 A.D.2d 936, 937, 423 N.Y.S.2d 507, 508 (2d Dep't 1980); and *People v. Davis*, 72 A.D.2d 798, 798, 421

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13 In *People v. Hinton*, 31 N.Y.2d 71, 73-76, 334 N.Y.S.2d 885, 887-89 (1972), *cert. denied*, 410 U.S. 911 (1973), and *People v. Hagen*, 24 N.Y.2d 395, 400, 300 N.Y.S.2d 835, 839, *cert. denied*, 396 U.S. 886 (1969), the New York Court of Appeals merely ruled that a trial court had discretion to exclude the public from the courtroom during the testimony of an undercover police officer if testifying publicly would endanger the officer's life or jeopardize other criminal investigations. *See also Catalanotte*, 72 N.Y.2d at 644-45, 536 N.Y.S.2d at 18.

N.Y.S.2d 628, 628 (2d Dep't 1979). The number of these cases shows that closing the courtroom during the testimony of an undercover police officer is not unusual or novel.

Furthermore, the state had previously relied on the absence of any rule requiring a factual demonstration of the need to close the courtroom. Before *Jones*, the prosecution did not routinely collect or proffer evidence to support applications for closing the courtroom. Consequently, such evidence would be difficult to provide in the pre-*Jones* cases, and many retrials would be required.

Therefore, the state's reliance on pre-*Jones* law and the potential impact of the change, compel nonretroactive application of the *Jones* decision. *See United States v. Johnson*, 457 U.S. at 549-50; *see also Allen v. Hardy*, 106 S. Ct. at 2881 (ban on prosecutor's use of peremptory challenges to exclude racial minorities is not accorded complete retroactivity); *Solem v. Stumes*, 465 U.S. at 648-50 (rule barring police from initiating conversations with defendants after the defendants invoked the right to counsel is not accorded complete retroactivity).[14]

III. DUE PROCESS DOES NOT REQUIRE THAT A CONVICTION WHICH IS FINAL AND VALID UNDER SETTLED PRINCIPLES OF RETROACTIVITY BE INVALIDATED FOR THE LIMITED PURPOSE OF RECIDIVIST SENTENCING.

Defendant claims that principles of retroactivity do not apply in the context of recidivist sentencing, asserting that *Burgett v.*

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14 Furthermore, this is an especially inappropriate case for overturning settled retroactivity principles, and determining that *Jones* should apply retroactively, because defendant has not provided evidence that his 1971 conviction was in fact obtained in violation of *Jones*. Instead of providing the trial record, defendant relies upon his own speculative assertions of constitutional error and, based on those assertions, asks this Court to address the merits of his underlying conviction. Without that record, this Court cannot address the merits of defendant's claim. Therefore, if this Court were to apply the *Jones* decision retroactively to defendant's 1971 conviction, it would be necessary to reconstruct, despite the problems of assembling proof, what procedure the state court used to close the courtroom in 1971.

Texas, 389 U.S. 109 (1967), supports his claim. Defendant is incorrect, however. The conviction invalidated for recidivist sentencing purposes in *Burgett* was one that would have been invalidated under this Court's retroactivity decisions. Thus, the *Burgett* court, like the New York Court of Appeals in the instant case, simply applied recognized principles of retroactivity in deciding whether a conviction was a valid predicate for enhancing a sentence.

The court in *Burgett* held that a defendant's sentence could not be enhanced with a felony conviction obtained in violation of *Gideon v. Wainwright*, 372 U.S. 335 (1963), which provided that the appointment of counsel for an indigent criminal defendant "is fundamental and essential to a fair trial." *Gideon*, 372 U.S. at 342.[15] As the Court in *Burgett* noted, *Gideon* "was not limited to prospective applications." *Burgett*, 389 U.S. at 114 [citing *Doughty v. Maxwell*, 376 U.S. 202 (1964); *Pickelsimer v. Wainwright*, 375 U.S. 2 (1963)]. It has been applied retroactively because "it is self-evident that to deny a lawyer's help through the technical intricacies of a criminal trial . . . is to impede [the truth-finding function of a trial] and infect the criminal proceedings with the clear danger of convicting the innocent." *Tehan v. United States*, 382 U.S. 406, 416 (1966); *see also Gideon v. Wainwright*, 372 U.S. 335 (1963).[16] Consequently, a conviction obtained in violation of the right to counsel is invalid and cannot be used for any purpose at trial or sentencing. *See Loper v. Beto*, 405 U.S. 473, 480-85 (1972) (a conviction obtained in violation of *Gideon* cannot be used to impeach a defendant's credibility); *United States v. Tucker*, 404 U.S. 443, 448-49 (1972) (a conviction in violation of *Gideon* cannot be considered by a judge at sentencing).

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15 *See also Baldasar v. Illinois*, 446 U.S. 222 (1980) (an uncounseled misdemeanor conviction cannot be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term).

16 As stated in *Linkletter v. Walker*, 381 U.S. 618 (1965), the rule of *Gideon* "was actually applied retrospectively in that case since Gideon had collaterally attacked the prior judgment by post-conviction remedies." *Linkletter*, 381 U.S. at 628 n. 13.

This case, however, does not involve a *Gideon* violation, or implicate the truth-finding considerations underlying that decision. Consequently, defendant's attempted reliance on *Burgett* is misplaced.

Moreover, reason dictates that principles of retroactivity, which determine whether a final conviction can be overturned, also control whether that same conviction can be used to enhance a sentence. For example, in *Linkletter v. Walker*, 381 U.S. 618 (1965), a *habeas* petitioner was serving a nine year sentence on a conviction obtained through evidence seized in violation of the Fourth Amendment. Because the Court ruled that *Mapp v. Ohio*, 367 U.S. 643 (1961), extending the exclusionary rule to the states, was not retroactive to final convictions, Linkletter could not have his conviction overturned; consequently, he remained burdened with the direct consequences of the conviction and had to complete his prison sentence. *Linkletter*, 381 U.S. at 619-22; *id.* at 640 (Black, J., dissenting).

Under defendant's argument, however, if Linkletter had committed another crime after his release from prison, the conviction that had been reliable enough to keep him in prison, would be deemed too unreliable to be used to enhance his sentence on the later crime. This argument is flawed because the direct effects of a criminal conviction—imprisonment and civil disabilities—are at least as onerous, if not more so, than collateral consequences like the prospect of an enhanced sentence on a later conviction; the latter is a more remote consequence of the predicate conviction.

Defendant is therefore asking this Court to find that collateral consequences of a predicate conviction, like exposure to enhanced sentencing for later crimes, raise a greater constitutional question than that raised by Linkletter—who was forced to stay in jail on the very conviction that was allegedly unconstitutionally obtained. Defendant articulates no principled reason for this Court to draw such a distinction, nor could he.[17] The

17 The only reason defendant suggests, is his assertion that he is asking for something less than reversal of his 1971 conviction (Defendant's

issue presented in *Linkletter* is at least as pressing as that raised by defendant. Therefore, a conviction reliable enough to withstand collateral attack despite a change in the law, *a fortiori*, is reliable enough to serve as a predicate for enhancing a sentence on another crime.

In sum, the state court properly analyzed the constitutionality of defendant's 1971 conviction under settled principles of retroactivity. Under these principles, the 1971 conviction was a valid predicate for enhancing defendant's punishment on his 1986 sentence for another felony.

Petition at 18-20). Although asking for less may strengthen a person's negotiating position, it does not raise a claim to the level of a due process violation; rather, the effect is the opposite. That defendant wants less than the petitioner in *Linkletter*, indicates that the issues involved here are of a lesser magnitude than those in *Linkletter*. Therefore, the principles of retroactivity that controlled in *Linkletter* also control the instant case.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED IN ALL RESPECTS.

Dated: Brooklyn, New York
June 16, 1989

Respectfully submitted,

ELIZABETH HOLTZMAN
District Attorney
Kings County

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**Counsel of Record for Respondent*

APPENDIX

MEMORANDUM

SUPREME COURT : KINGS COUNTY

(Miscellaneous Motion Part)

By SLAVIN, J.

Dated November 21, 1986

Indictment No. 577/71

PEOPLE OF THE STATE OF NEW YORK

vs.

STEVEN CATALANOTTE

Defendant, Steven Catalanotte, moves pursuant to CPL 440.10(2) for an order vacating his 1971 conviction under Indictment No. 577/1971. Defendant would have this court give retroactive effect to the Court of Appeals decision in *People v Jones* (47 NY2d 409 [1979]). In that case, the court reversed a conviction for Criminal Sale of a Controlled Substance in the Third Degree and Criminal Impersonation and held that the trial court, in summarily closing the trial to the public without a factual showing that defendant's right to a public trial was not being sacrificed for less than compelling reasons, was reversible error *per se*, requiring no showing of prejudice. Defendant takes great pains herein in cataloguing subsequent cases of reversals of convictions based on the same error, all of which cite *Jones* (*supra*).

The facts and circumstances of Mr. Catalanotte's trial are undisputed. The trial court did summarily exclude the public

without the factual showing later required in *People v Jones* (47 NY2d 409, *supra*). However, petitioner's contention that *Jones* (*supra*) is to be applied retroactively is completely without merit.

Petitioner cites *U.S. v Johnson* (457 US 562) in support of his theory of retroactivity. That case provides an exemplary history and analysis of the Supreme Court's struggle with the concept of retroactivity. However, that case deals with Fourth Amendment issues only and, even so, holds that, subject to certain stated exceptions (not relevant here), such retroactive effect is to be applied only to those convictions not yet final when the new decision was rendered (*U.S. v Johnson*, *supra* at 563).

Here, petitioner claims that his right to a fair trial under the sixth Amendment was impaired and that *People v Jones* (*supra*) must be applied retroactively even though it was decided fully four years after he had exhausted the full appellate process available to him. Yet, the New York Court of Appeals has never proclaimed the retroactive effect of its decision in *Jones* (*supra*) and the relevant case law, as discussed herein, similarly provides no support whatever for petitioner's argument (see, also, *Allen v Hardy*, ____ US ____, 106 S.Ct. 2878, which held that the Court's decision in *Batson v Kentucky*, ____ US ____, 106 S.Ct. 1712, which overruled a portion of *Swain v Alabama*, 380 US 202, and changed the standard for proving unconstitutional abuse of peremptory challenges, would not be applied retroactively on collateral review of convictions that became final before the *Batson* opinion was announced).

Petitioner's motion, therefore, to vacate judgment is denied with leave to appeal.

This shall constitute the decision, opinion and order of the court.

_____

J. S. C.

[LETTERHEAD OF JOSEPH GIARAMITA, JR.]

April 7, 1988

EXPRESS MAIL

Honorable Judge Stewart F. Hancock, Jr.
COURT OF APPEALS
8108 New York State Road
Route 92
Manlius, New York 13104

Re: People v. Steven Catalanotte

Dear Honorable Judge:

This letter is written after the conference call with Assistant District Attorney Darrell Fields on April 5, 1983.

It is the appellant's contention that this challenge pursuant to CPL section 400.21(7)(b) speaks to the constitutionality of his first conviction at the time the People seek to make a predicate felony finding. The court should make a determination as of the present status of the law, which would hold that the appellant's first conviction unconstitutional under the *Jones* decision.

The contention of the People that the *Jones* holding is non-retroactive should apply to an attack on a conviction. Annexed hereto is a copy of the decision on the appellant's motion pursuant to CPL section 440.10, which properly held that the conviction could not be set aside because there was not a retroactively effective change in the law. There should be a lesser standard in applying the *Jones* standard under CPL section 400.21 than in a CPL 440.10. CPL section 400.21 was enacted many years after CPL section 440.10 and the legislature omitted the restructive provision found in 440.10(2)(a).

If the decision of the Appellate Division is allowed to stand, then this will mean that the appellant received an enhanced punishment and sentence based upon a conviction that is unconstitutional under existing New York law.

Although the appellant cannot do anything to overturn this unconstitutional conviction now, it is unfair to allow it to be used against him. He was sentenced to 10 year's imprisonment in that case, served his sentence and paid the penalty once. This conviction should not be always available when the People would want to use it to enhance a punishment. The line should not be drawn in accordance to the retroactivety of the constitutional error; CPL section 400.21(7)(b) states that an unconstitutional conviction "must not be used".

My client is presently a law abiding person who is gainfully employed and the sole means of support for his wife and child. The interests of justice and fairness will be served if the Court of Appeals provides guidance in resolving this open question under New York law. It is respectfully requested that leave be granted and for setting of reasonable bail.

Sincerely,

/s/ JOSEPH GIARAMITA, JR.
Joseph R. Giaramita, Jr.
Attorney at Law

cc: Darrell Fields,
Assistant District Attorney
210 Joralemon Street
Brooklyn, New York 11201

To be argued by:
JOSEPH R. GIARAMITA, JR., ESQ.
Time: 20 minutes

COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

STEVEN CATALANOTTE,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

JOSEPH R. GIARAMITA, JR., ESQ.
Attorney for Appellant
1797 Stillwell Avenue
Brooklyn, New York 11223
718/236-4747

Completed: June 16, 1988

POINT ONE

APPELLANT SHOULD NOT HAVE BEEN SENTENCED AS A PREDICATE FELONY OFFENDER BECAUSE HIS FIRST CONVICTION WAS OBTAINED IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS PURSUANT TO CPL SECTION 400.21 (7)(b).

The Unconstitutional Conviction

On the first felony conviction, the appellant was convicted after trial and sentenced to a term of ten year's imprisonment. On appeal, the decision in the trial court in 577/71 was affirmed without opinion with one Justice dissenting. *People v. Catalonotte*, 41 A.D. 2d 968 (2d Dept., 1973). The Court of Appeals affirmed the order of the Appellate Division in a per curiam opinion. *People v. Catalonotte*, 36 N.Y. 2d 192 (1975).

This appeal concerns itself with an application pursuant to Criminal Procedure Law ("CPL") section 400.21 (7)(b), which governs the procedure for determining whether a defendant is a second felony offender. The statute states that a previous conviction in this or any other jurisdiction which was obtained in violation of the rights of the defendant under the applicable provisions of the constitution of the United States *must not be counted* in determining whether the defendant has been subjected to a predicate felony conviction. (Emphasis added). *See generally*. 58 St. Johns L.R. 658-669; *People v. Love*, ____ N.Y. 2d ____ (decided 5/31/88, N.Y.L.J. 6/7/88).

The trial court erroneously adjudicated and sentenced him as second felony offender because his 1971 conviction was obtained in violation of his sixth amendment right to a public trial under *People v. Jones*, 47 N.Y. 2d 409, *cert. denied*, 444 U.S. 192. There is no dispute that the trial court summarily closed the courtroom during the testimony of an undercover officer after a request from the prosecutor to take judicial notice of the jeopardy such agents are subjected to by reason of their occupation. Subsequently, in *People v. Jones*, 47 N.Y. 2d 409, cert. denied 444 U.S. 192 the Court of Appeals held this type of execution of the public as in violation of the sixth amendment right to a public trial.

In *Jones*, the Court summarily closed the courtroom upon request by the prosecutor during the testimony of the undercover police officer. The prosecutor asked the court to take judicial notice that the nature of the work of an undercover agent in New York places him in jeopardy. The Court of Appeals reversed and ordered a new trial.

The Court of Appeals held that there should have been a factual showing that an exception to the norm of public trial was justified. 47 N.Y. 2d at 415. Also, prejudice need not be shown and harmless error analysis is inapplicable. As stated in *Jones*, ". . . . it is sufficient to say that the decision herein far transcends the issue of guilt or the disposition of this particular case." 47 N.Y. 2d at 415. "It is for the protection of all persons accused of crimes . . . . the innocently accused, that they may not become the victim of an unjust prosecution, as well as the guilty, that they may be awarded a fair trial." 47 N.Y. 2d at 415. "The harmless error rule is no way to gauge the great, though intangible, societal loss that flows from the frustration of such a goal." 47 N.Y. 2d at 416. The Court noted that the defendant would have a near impossible tak of proving prejudice and would render the right to a public trial illusory and beyond appellate review on that basis. 47 N.Y. 2d at 417.

The Court of Appeals later upheld Jones and extended it further. In *People v. Cuevas*, 50 N.Y. 2d 1022, the People sought to have the courtroom closed solely on representation by the prosecutor that the witness was an undercover agent. Although the trial court questioned the prosecutor prior to granting the motion, it erred in failing to make an adequate inquiry of the witness, ~~as~~ well as the factual findings prescribed in *People v. Jones, supra.*

It is now well settled that exclusion of the public for the testimony of an undercover agent requires a factual showing that the defendant's right to a public trial is not being sacrificed for less than compelling reasons and that such error is reversible "per se", requiring no showing of prejudice. *People v. Jones*, 47 N.Y. 2d 409, 417. Many cases have similarly held that reversal is required for this type of constitutional error. *People v. Gonzalez*, 74 A.D. 2d 928 (Second Dept., 1980); *People v. Warren O.*, 86 A.D. 2d 895 (Second Dept., 1982); *People v. Brown*,

79 A.D. 2d 659 (Second Dept., 1980); *People v. Dioty*, 73 A.D. 2d 802 (Fourth Dept., 1979); *People v. McNamee*, 71 A.D. 2d 550; *People v. Cousart*, 74 A.D. 2d 877 (Second Dept., 1980).

Similarly, in this appellant's appeal to the Appellate Division, the People also merely relied on the Court's statement that there was a real and present danger for the safety of the undercover agent. Constitutional error is apparent from the brief of the People on the appeal of Indictment number 577/71, filed with the Appellate Division, Second Department. In the People's brief against the appellant, the People urged as follows: "We submit that the Court could take such judicial notice . . . . we submit that the testimony of an undercover agent is, contrary to appellant's opinion, per se equivalent to "unusual circumstances" as a matter of law which warrant a court from excluding the public during the course of the examination of an undercover agent."

With the *Jones* decision, this argument is clearly constitutional error under existing law. A similar argument was asserted by the People and failed in the *Jones* case.

POINT II

SINCE CPL SECTION 400.21(7)(b) SPEAKS TO THE CONSTITUTIONALITY OF A CONVICTION AT THE TIME THE PEOPLE SEEK ENHANCEMENT OF A SENTENCE AS A PREDICATE FELON, THEN THE APPELLANT'S FIRST CONVICTION SHOULD NOT BE USED BECAUSE IT IS UNCONSTITUTIONAL UNDER EXISTING LAW.

It is the appellant's contention that this challenge pursuant to CPL section 400.21(7)(b) speaks to the constitutionality of his first conviction at the time the People seek to enhance a sentence by finding a defendant to be a predicate felony offender. The court should make a determination as of the status of the law at the time they see enhancement. This would hold the appellant's first conviction unconstitutional under the *Jones* decision.

Although the appellant cannot do anything to overturn this unconstitutional conviction now, it is unfair to allow it to be

used against him to enhance his sentence and to use it towards a predicate felony finding. He was sentenced to 10 year's imprisonment in that case, served his sentence and paid the penalty once. An unconstitutional conviction should not be always available when the People would want to use it to enhance a punishment.

If the decision of the Appellate Division is allowed to stand, then this will mean that the appellant will receive enhanced punishment, mandatory imprisonment and a sentence based upon a conviction that is unconstitutional under existing New York law.

POINT III

THE PRINCIPLE OF COLLATERAL ESTOPPEL IS INAPPLICABLE SINCE THE CONVICTION BEING CHALLENGED IN THIS CPL SECTION 400.21(7)(b) APPLICATION IS UNCONSTITUTIONAL

Since the appellant's first conviction is unconstitutional under existing law, it would be unfair to hold that he should be collaterally estopped from challenging its validity when the People seek to use this infirm conviction to find an appellant to be a predicate felony offender.

Although the collateral estoppel is applied in criminal actions, its application is less frequent than in civil actions. *People v. Sailor*, 65 N.Y. 2d 224, 228.

Specifically, collateral estoppel should be inapplicable whenever there is a subsequent change in the law which affects the validity of a conviction for purposes of finding an appellant to be a predicate felony offender.

The People's contention that collateral estoppel should apply is misplaced. In fact, the People did not dispute that the conviction was unconstitutional when the appellant made an application pursuant to CPL section 440.10. As stated by Kings County Supreme Court Judge Slavin in his decision:

> The facts and circumstances of Mr. Catalanotte's trial are undisputed. The trial court did summarily exclude the

public without the factual showing later required in *People v. Jones*, 47 N.Y. 2d 409.

The People cannot maintain that the defendant should be collaterally estopped in a CPL Section 400.21 application after failing to challenge the constitutionality of the same conviction in a CPL Section 440.10 application.

POINT IV

TO REQUIRE A "RETROACTIVELY EFFECTIVE CHANGE IN THE LAW" STANDARD IN A CPL SECTION 400.21 (7)(b) APPLICATION RESULTS IN CONVERTING IT INTO A CPL SECTION 440.10 (1)(a), 440.10 (2)(a) PROCEEDING, WHICH WAS NOT INTENDED BY THE LEGISLATURE.

The applicable standard in CPL section 400.21 (7)(b) proceeding is to be contrasted with a motion to set aside a conviction on the ground that the judgment was obtained in violation of a right under the CPL section 440.10 (1)(h), (2)(a). A CPL 440 application has an additional limitation which requires that "the court must deny a motion to vacate a judgment when the ground was previously determined upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue." Criminal Procedure Law, section 440.10(2)(a).

It is important to note that the CPL sectin 400.21 (7)(b) omits this additional "retroactively effective change in law" standard even though it was enacted many years after it was expressly set forth in CPL section 440.10. The legislature omitted this restrictive provision because it did not intend to adopt the same retroactivity standard in a CPL section 400.21 (7)(b) application.

A retroactivity standard should only affect the right to challenge a conviction in a CPL Section 440.10 application. The appellant attacked the validity of the 577/71 conviction pursuant to 440.10 of the CPL. On November 21, 1986 the Kings County Supreme Court held that it was undisputed that consti-

tutional error was committed during the trial, in accordance with the *Jones* decision. The court, however, held that since there was not a retroactively effective change on the case law, then the motion must be denied. Pursuant to 440.10, a conviction that is obtained in violation of the constitution can only be attacked after having been previously determined upon an appeal if there is a retroactively effective change in the law. *Criminal Procedure Law* Section 440.10 (2)(a); United *States v. Johnson*, 457 U.S. 537. The contention of the People that the Jones holding is nonretroactive should only apply to an attack on a conviction under CPL 440.10. There should be a lesser standard in applying the Jones standard under CPL section 400.21 than in a CPL Section 440.10 application.

It is strongly submitted that the plain meaning of CPL Section 400.21 governs when it states clearly that an unconstitutional conviction "must not be used" for enhancement of a later felony conviction.

A review of the decision of the Appellate Division on February 16, 1988 in this case indicates that the standard to be successful in a challenge of the constitutionality of a conviction in a 400.21 (7)(b) proceeding is virtually identical to a challenge to set aside a judgment pursuant to CPL Section 440.10. As stated, an examination of the wording of the respective statutes indicates that the legislature could not have intended to make them identical yet omitted the "retroactively effective change in the law" limitation which is present in CPL section 440.10 (2)(a). Of course, a determination that a defendant is not a second felony offender has far less consequences than the setting aside of a judgment of conviction.

It is respectfully submitted that error was committed by the Appellate Division, Second Department when it focused upon the degree of retroactivity to be accorded the rule under *People v. Jones*, 47 N.Y. 2d 409. No caselaw was offered in support of the finding that a retroactivity test is to be applied in cases where the constitutional validity of a conviction was being challenged pursuant to CPL section 400.21 (7)(b).

CONCLUSION

For the reasons set forth in Points I through IV, the sentence of the judgment of conviction as a predicate felony offender should be reversed as a matter of law, and the matter should be remanded for sentencing in the trial court as a first time felony offender.

Respectfully submitted,

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Dated: June 16, 1988

To be argued by
Joseph R. Giaramita, Jr
20 Minutes

Kings County Indictment No. 5265/81

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION: SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

STEVEN CATALONOTTE,

Defendant-Appellant.

APPELLANT'S BRIEF

Joseph R. Giaramita, Jr., Esq.
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November 28, 1986

TO: Elizabeth Holtzman
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400 Municipal Building
Brooklyn, New York 11201

* * *

to make an adequate inquiry of the witness, as well as the factual findings prescribed in *People v. Jones, supra.* Of course, the People in Catalonotte asked the Appellate Division to take judicial notice and asked for a per se rule regarding the exclusion of the public when receiving the testimony of an undercover officer. This is clearly an unsuccessful argument.

Many cases have held that reversal is required for this type of constitutional error. *People v. Gonzalez*, 74 A.D.2d 928 (Second Dept., 1980); *People v. Warren O.*, 86 A.D.2d 895 (Second Dept., 1982); *People v. Brown*, 79 A.D.2d 659 (Second Dept., 1980); *People v. Doty*, 73 A.D.2d 802 (Fourth Dept., 1979); *People v. McNamee*, 71 A.D.2d 550. The appellant is submitting that he should not have the unconstitutional conviction used against him.

Appellant recently attacked the validity of the 577/71 conviction pursuant to 440.10 of the CPL. On November 21, 1986 the Kings County Supreme Court held that it was undisputed that constitutional error was committed. The court, however, held that there was not a retroactively effective change on the case law. Thus, the motion was denied. Pursuant to 440.10, a conviction that is obtained in violation of the constitution can only be applied if there is a retroactively effective change in the law. *Criminal Procedure Law Section* 440.10(2)(a).

There is no similar language restricting the appellant from not utilizing this conviction in a 400.21(b)(7) challenge. The failure to include the express requirement of retroactively effective change in law indicates a desire to place a lesser standard in cases where the consideration is sentencing a defendant as a predicate. The defendant should not be subject to an enhanced sentence on the basis of an unconstitutional conviction.

CONCLUSION

It is submitted that the appellant be sentenced as a first felony offender and that his sentence is adjusted on that basis.

Respectfully submitted,

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